STATE OF MICHIGAN

COURT OF APPEALS

JAMES BRENNAN,

Plaintiff-Appellant,

v

CBP FABRICATION, INC.,

Defendant-Appellee.

UNPUBLISHED
June 20, 2006

No. 267094
Wayne Circuit Court
LC No. 04-410265-NO

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals by right from a circuit court order granting defendant's motion for summary disposition in this premises liability action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. If the moving party satisfies its burden of identifying undisputed facts that entitle it to judgment, summary disposition is properly granted unless the opposing party presents evidence of the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

The parties do not dispute that plaintiff was an invitee on defendant's premises or that the condition, a sloping walkway covered with ice and snow, was open and obvious. A landowner does not owe a duty to protect invitees from any harm presented by an open and obvious danger unless special aspects of the condition, i.e., something unusual about the character, location, or surrounding conditions, make the risk of harm unreasonable. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-517; 629 NW2d 384 (2001). However, "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id.* at 519. This doctrine applied to an open and obvious accumulation of snow and ice means that a premises possessor must take reasonable steps within a reasonable period of time after the accumulation of snow and ice has arisen to lessen the hazard of injury only if there is some "special aspect" that makes condition "unreasonably dangerous." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332;

683 NW2d 573 (2004). "An open and obvious accumulation of snow and ice, by itself, does not feature any 'special aspects.'" *Robertson v Blue Water Oil Co,* 268 Mich App 588, 593; 708 NW2d 749 (2005), citing *Mann, supra* at 332-333.

A special aspect is one that presents a high risk of severe harm, e.g., an unguarded deep pit, which presents a risk of serious injury or death to the unobservant person who tumbles in. *Lugo, supra* at 518. The snow-covered ramp did not present a high risk of severe harm because falling a few feet to the ground does not present the same degree of risk of severe harm as falling into a thirty-foot-deep pit. *Corey v Davenport College of Business (On Remand),* 251 Mich App 1, 7; 649 NW2d 392 (2002). While plaintiff's expert opined otherwise, his opinion does not create an issue of fact because the duty to interpret and apply the law is a function allocated to the courts, not to the parties' expert witnesses. *Reeves v Kmart Corp,* 229 Mich App 466, 475; 582 NW2d 841 (1998).

Another recognized special aspect may occur when the invitee could not avoid the danger regardless of the care taken for his or her own safety. *Lugo, supra* at 518. Thus, although a condition is open and obvious, when it is "effectively unavoidable" because of "special aspects," it may present an unreasonably dangerous risk. *Joyce v Rubin,* 249 Mich App 231, 242; 642 NW2d 360 (2002), citing *Lugo, supra* at 517-518. Plaintiff argues that the snow and ice covered ramp was "effectively avoidable" because there was no other safe route providing access to the scrap metal bin that plaintiff was there to inspect. Defendant argues that plaintiff could have avoided the danger by forgoing the inspection, or postponing it until conditions were more favorable. We agree with defendant. The present case is distinguished from that in *Robertson, supra.* Here, plaintiff was not a "paying customer" who came to defendant's premises on a weekly basis to purchase goods defendant offered for sale to the general public. *Id*. at 591, 594. Rather, plaintiff was at defendant's steel manufacturing plant for the purpose of inspecting a bin that plaintiff had placed there in his own business of collecting scrap metal from other business. More importantly, plaintiff had a number of alternatives available to him to avoid the risk presented by the snow and ice covered ramp, including, foregoing the inspection, performing the inspection when conditions were more favorable, asking defendant's employees, who were present, to inspect the bin, or waiting until defendant's employees had cleared and salted the ramp. In sum, the snow and ice covered ramp "presented [no] 'special aspects' . . . because the condition was both common and avoidable." *Kenny v Kaatz Funeral Home Inc*, 264 Mich App 99, 122 (Griffin, J., dissenting); 689 NW2d 737 (2004), rev'd "for the reasons stated in the dissenting opinion," 472 Mich 929; 697 NW2d 526 (2005).

Consequently, the trial court correctly applied the open and obvious doctrine to grant defendant's motion for summary disposition.

We affirm.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Patrick M. Meter